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California Peace Officers Association

ABOOD OVERTURNED; PUBLIC SECTOR AGENCY-SHOP ARRANGEMENT REQUIRING DUES FROM NONMEMBERS CONTRAVENES FIRST AMENDMENT

Courtesy of James R. Touchstone, Esq.
On June 27, 2018, in the case of *Janus v. AFSCME*, Council 31, 2018 U.S. LEXIS 4028 (U.S. June 27, 2018), the Supreme Court of the United States held that public sector employees who are represented by a union but who have refused to join as members are not required to pay a fee to cover the union's collective bargaining and other costs. The Court overturned its decision in 1977's *Abood v. Detroit Bd. of Ed*.,[1] which upheld a similar law, for First Amendment violations. The Court found that *Abood* had permitted the "perpetuation of free speech violations" in its sanction of the agency fees charged by public sector unions ever since.

Background

Public employees in Illinois are permitted to unionize under the Illinois Public Labor Relations Act.[2] A union is designated as the exclusive representative of all the employees, including those who do not join, if a majority of the employees in a bargaining unit vote to be represented by a union. Collective bargaining is the sole domain of the union in this situation. Individual employees cannot negotiate directly with their employer, nor have another agent represent the employees in doing so. A nonmember must pay a percentage of union dues, known as his or her "agency fee."
Under *Abood*, the agency fee may cover union expenditures attributable to those activities "germane" to the union's collective-bargaining activities, but may not cover the union's political and ideological projects. The union sets the agency fee every year and updates nonmembers with an explanation of its expenditures. In this "agency-shop" arrangement under Illinois law, unions charge nonmembers, "not just for the cost of collective bargaining per se, but also for '[l]obbying' '[s]ocial and recreational activities,' 'advertising,' '[m]embership meetings and conventions,' and 'litigation,' as well as other unspecified '[s]ervices' that 'may ultimately inure to the benefit of the members of the local bargaining unit.'"
Mark Janus, a nonmember state employee whose unit was represented by a public-sector union ("Union"), opposed the Union for its collective bargaining and other positions. He challenged the agency fee, arguing that it violated his First Amendment rights because the fee deduction was equivalent to coerced political speech, and that the First Amendment prohibited coercing monies from nonmembers. A district court concluded that *Abood* foreclosed Janus' claim and dismissed it. The Seventh Circuit Court of Appeals affirmed.

Discussion

In a contested 5-4 decision, the Supreme Court of the United States held that the First Amendment was violated when money was taken from nonconsenting employees for a public-sector union. The Court concluded that agency fees could no longer be taken from nonconsenting public employees. The Court overruled *Abood*, finding that it was poorly reasoned, impractical, and inconsistent with

standard First Amendment principles.

The Court began its discussion of the constitutionality of agency-shop arrangements by noting that its recent cases had "recognized that [Abood] [wa]s 'something of an anomaly,'[3]…and that *Abood's* 'analysis [wa]s questionable on several grounds.'"[4] The Court explained that the First Amendment both generally prohibits the abridgment of freedom of speech and protects the right to reject association for expressive purposes. The Court quoted *West Virginia Bd. of Ed. v. Barnette*[5] in observing: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The Court observed that "compelling a person to subsidize the speech of other private speakers" raised serious First Amendment concerns. Here, the Court found that agency fees were akin to forcing nonmembers to confess their faith in the union's speech, a notion that Janus here found objectionable. The Supreme Court determined that, regardless of which standard of scrutiny it applied, Illinois' agency-fee scheme could not survive.

The Court found that neither of *Abood's* two justifications for agency fees was persuasive. First, agency fees could not be upheld on the ground that they foster "labor peace." The Court explained that in the 41 years since *Abood*, concerns that "conflict and disruption" would ensue if employees were represented by more than one union had proved to be unfounded from other examples. The Court noted that in the Federal Government and the 28 States with laws that prohibited agency fees, millions of public employees were represented by unions that effectively served as the exclusive representatives of all the employees. Thus, agency fees were not a necessary requirement in order to achieve "labor peace."

The Court next turned to *Abood's* second justification for sanctioning agency fees. The Court explained that avoiding the risk of "free riders" - people who obtained the benefits of union representation without paying for union membership – was also not a compelling state interest because free-rider arguments were generally insufficient to overcome First Amendment objections. Moreover, in non-agency-fee jurisdictions, unions had sought to represent nonmembers even in the absence of agency fees. The Court also observed that other private groups spoke out with the goal of getting government action that would benefit nonmembers. The Court asked: "May all those who are thought to benefit from such efforts be compelled to subsidize this speech?" For example, could the government require all senior citizens to subsidize AARP because it lobbied on the behalf of senior citizens generally? Finding that the answer to both questions was obviously no, the Court explained that "the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay." The Court thus concluded that public sector agency-shop arrangements violated the First Amendment.

Turning to the question of whether *Abood* should be overruled, the Supreme Court found that there were very strong grounds for overruling *Abood*: (1) *Abood* was poorly reasoned because it cited cases that were not on point; (2) *Abood* engendered unworkable results because unions made it difficult to determine which expenses nonmembers could be required to cover, thus giving unions too much freedom to do "just about anything that the union might choose to do," while making challenging vague expense breakdowns a "laborious and difficult" task; (3) public spending since *Abood* had increased so dramatically that collective bargaining now was likely more politically significant than *Abood* ever contemplated; and (4) the short-term nature of collective-bargaining agreements diminished *Abood's* applicability.

The Court found that the decades-long history of *Abood's* application and implementation was no reason to uphold it because it would be "unconscionable to permit free speech rights to be abridged in perpetuity" to preserve contemporary relatively short-term contracts, especially when "public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*." The Court acknowledged some "unpleasant transition costs in the short term" for unions, but those effects were outweighed by the "many billions of dollars that ha[d] been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment." The Court consequently overruled *Abood*.

Having concluded that States and public-sector unions could no longer extract agency fees from nonconsenting employees, the Court accordingly reversed the Seventh Circuit's judgment and remanded the case.

Dissent

Joined by three other justices, Justice Kagan argued that *Abood* had, for forty years, struck a "stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper." Observing that *Abood* was "deeply entrenched" in the country's law and economic life affecting thousands of contracts and millions of employees, Justice Kagan found that the majority had no real idea what the repercussions or scope of overruling *Abood* might be. Kagan concluded that this argued in favor of retaining *Abood* instead. Instead, the majority "overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to."

HOW THIS AFFECTS YOUR AGENCY

With a number of amicus briefs signed by law enforcement groups submitted prior to the decision, agencies are likely well aware of the potential significance of *Janus v. AFSCME*, *Council 31*. The majority apparently considered its prior decisions warning enough that *Abood's* demise was forthcoming. As Justice Kagan's dissent noted, the majority overruled *Abood* "even though the government services affected — policing, firefighting, teaching, transportation, sanitation (and more) — affect the quality of life of tens of millions of Americans."

The impact of the decision on law enforcement unions may differ notably from other public sector unions. Legal aid and other services may impact that distinction in maintaining membership and dues to perhaps minimize the relative impact of this decision on law enforcement. However, it is also possible that union lobbying activities will decline due to the anticipated decline in dues anticipated following the Janus decision. The full effects of the Janus decision, as it impacts law enforcement, are somewhat speculative at this juncture and remain to be seen.

As always, if you wish to discuss this matter in greater detail, please feel free to contact me at (714) 446–1400 or via email at jrt@jones-mayer.com.

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[1] 431 U. S. 209 (1977).
[2] 5 ILCS 315 (2008).
[3] Knox v. Service Employees, 567 U. S. 298, 311 (2012).
[4] Harris v. Quinn, 573 U. S., at ___ (2014).
[5] 319 U. S. 624, 642 (1943).

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